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IN THE

Supreme Court of the United States

October Term, 1963

No. 573

BRUCE M. SIGMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on July 24, 1963, as modified by an order on petition for rehearing entered on September 11, 1963.

OPINIONS BELOW

No opinion was written by the United States District Court. The opinion of the Court of Appeals is reported in 320 F. (2d) 176 and is reproduced in Appendix B hereto, *infra* p. App. 4.

JURISDICTION

The judgment of the Court of Appeals was entered on July 24, 1963, p. App. 8, *infra*. A timely petition for rehearing filed on August 23, 1963, was denied on September 11,

1963, p. App. 9, *infra*. On October 9, 1963, this Court granted the petitioner until and including October 18, 1963, as the time for filing the petition for certiorari. The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254(1) and Rule 22(2), Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

Question No. 1

When the tribunal, officer or person administering the oath has made an investigation from which it concludes a certain factual situation to exist, does one, having taken an oath to testify truly before the tribunal, officer or person, commit perjury by testifying falsely before the tribunal, officer or person on the subject on which the conclusion was made?

Question No. 2

In a jury trial for the crime of perjury, where the jury is required to determine when the two Government's independent witnesses were committing perjury and when they were testifying truthfully on the material matter, has the Government presented the quantum of proof necessary for the case to be submitted to the jury for their deliberation and verdict?

STATUTES INVOLVED

The statutory provisions involved are Title 18 U.S.C., Section 1621, Title 11 U.S.C. Section 44(a), (Bankruptcy Act. §21a), Title 11 U.S.C. Section 32(c) (1), (2), (4) and (7), (Bankruptcy Act, §14(c) (1), (2), (4) and (7)),

Title 11 U.S.C. Section 1 (9), (Bankruptcy Act §1(9)); Title 11 U.S.C. Section 66(2), (6) and (7), (Bankruptcy Act §38(2), (6) and (7)) and Title 11 U.S.C. Section 69(a), (Bankruptcy Act §41(a)). They are printed in Appendix-A *infra*, pp. App. 1.

STATEMENT OF THE CASE

On September 14, 1962, the petitioner was found guilty on one count of a one count information[1] which charged him with the crime of perjury under Title 18 U.S.C., Section 1621. The petitioner was sentenced to two years imprisonment to be suspended after having served four months in a jail type institution, and he was fined $2,000.00. The petitioner appealed on the grounds that (1) the element of materiality had not been proved; and (2) the evidence was not legally sufficient to support a verdict of guilty. The Court of Appeals for the Ninth Circuit affirmed the conviction.

The information charged the petitioner with the crime of perjury and read as follows:

> "That on or about July 18, 1961, in the Bankruptcy Court of the District Court of the United States for the Western District of Washington, Southern Division, at Tacoma, Washington, Bruce M. Sigman, having taken a duly authorized oath administered by the Referee in Bankruptcy; O. M. Pitzen, in the proceedings in bankruptcy then being heard by said Referee, O. M. Pitzen, of the matter of Bruce M. Sigman, d/b/a Seattle-Tacoma Auto Exchange, American Buyer's Service, Central Surplus and Polka Dot Sales, that he, Bruce M. Sigman, would testify truly,

[1] An information was filed on the day of trial, containing the matters charged in the indictment. The date of the violation was changed. The petitioner consented to this procedure.

did then and there testify contrary to said oath;

"That Bruce M. Sigman then and there did testify that in the year prior to testifying that he had lived in Salem and went into the automobile business with the Vanek twins, that they, the Vanek twins, owned the business but that he (Bruce M.) Sigman, was operating with them, that he, Bruce M. Sigman, had his name on the business bank accounts because the father, Joseph Vanek, didn't believe the Vanek twins were old enough to sign checks individually, that he went into business with the Vanek twins under an agreement that the Vanek twins were to pay said (Bruce M.) Sigman for his teaching them the used car business, that the Vanek twins were to put up the money and said Bruce M. Sigman was to put up the ability and his services, and that he, Bruce M. Sigman, put nothing else into the business.

"That Bruce M. Sigman then and there knew that his testimony was material to the matter then being heard of his bankruptcy proceedings, and he then and there knew that he was testifying contrary to said oath and that in truth and in fact, as he then and there well knew, he, Bruce M. Sigman, had gone into business with the Vanek twins and was an authorized signature on the business bank accounts because he had in fact invested fifty per cent of the capital in said business, and that he had in fact invested $5,000.00 and the Vanek twins had invested $5,000.00 in said business."

The petitioner had operated various businesses prior to May, 1960, Tacoma Auto Exchange, Auto Buyers Service, Central Surplus and Polka Dot Sales (R. 13). On May 13, 1960, three creditors of the petitioner filed a petition forcing the petitioner into involuntary bankruptcy (R. 14). On May 26, 1960, the bankrupt was adjudged bankrupt (R. 15). On May 31, 1960, the petitioner filed bankruptcy schedules, including a statement of affairs and a list of creditors, which reflected liabilities of $315,504.83, assets

of $237,691.17, which were liquidated for $94,019.14, including cash of $17,580.17 and a bond of $10,000.00 (R. 16, 17, 18, 19, 20). A trustee in bankruptcy was appointed on June 15, 1960, and he filed his final report on June 13, 1962 (R. 18). The bankrupt estate was still open on September 11, 1962 (R. 18).

On July 18, 1961, the petitioner appeared before the Referee in Bankruptcy in the matter of a 21a hearing (Title 11 U.S.C., Section 44(a), Bankruptcy Act §21a), and the examination of the petitioner consisted of inquiry into: (Refer to Appendix-C, *infra* for text of examination.)

(1) That petitioner had operated Central Surplus in Tacoma, Washington between January 29, 1960, and May 5, 1960, that only checks, no cash, had been deposited to the bank account (R. 57). That there was a discrepancy in sales reported and sales accounted for of $6,000.00 (R. 66).

(2) That petitioner opened the Polka Dot Sales in Portland, Oregon on about March 3, 1960 (R. 61). That between March 3, 1960, and March 15, 1960, sales turned in totaled $18,629.88 with deposits of $5,840.00. That petitioner had received $22,100.00 in $100.00 bills. That there was a difference between the sales accounted to the trustee, $18,600.00, and cash determined, $28,000.00 ($22,100.00 + $5,840) (R. 65).

(3) That petitioner carried cash on his person and had cash in a couple of safe deposit boxes at the *New Heathman Hotel in Portland, Oregon* between January 29, 1960, and May, 1960 (R. 58, 61).

(4) That subsequent to May, 1960, the petitioner had

entered an automobile business in Salem, Oregon with David Vanek and Dean Vanek. That the Vaneks owned the business and the petitioner was operating the business for 50% of the profit. That the petitioner had no authority to sign the checks of the business, individually, but would sign with either of the Vaneks because their father did not feel they were old enough to manage the money (R. 47).

(5) That after the petitioner and the Vaneks were in business for a short time when the Vaneks believed that the petitioner was "getting too much," the business association of the petitioner and the Vaneks was dissolved with the petitioner to receive $4,200.00 in cash, $1,700.00 in automobiles and a building which had cost $1,300.00. That the Vaneks still owed the petitioner about $3,400.00, which would be reduced to a couple of thousand dollars because of bad accounts receivable.

(6) That the following question was asked of petitioner and the following reply was given by petitioner with respect to the automobile business that petitioner had entered into with the Vaneks:

"Q. Now, aside from your services did you put anything into this business?

"A. No, sir." (R. 55.)

Out of this examination of the petitioner arose the substance of the perjury charged in the indictment. The trial court in its charge to the jury held that the ultimate question for the jury to resolve was:

"Did Mr. Sigman (the petitioner) make an investment of $5,000.00 in this business (the business the

petitioner entered into with the Vaneks)?" (R. 635.)

The respondent's case was presented by 4 witnesses; they consisted of John Bland, Dean L. Vanek and David J. Vanek, twin brothers, and their father, Joseph M. Vanek. The evidence that came in during appellee's case was as follows:

From the testimony of John Bland: In August and September of 1960, Bland was employed as the general sales manager for Valley Motor Company in Salem, Oregon. Dean Vanek and David Vanek had been working for the company since May or June of 1960. The petitioner, Bland had known him for approximately 10 years, applied for and was hired by the company as a car salesman in August, 1960. The petitioner worked for the company for 2 months, sold 2 cars and received a minimum of $100.00 per car (R. 95). The second time Bland talked with the petitioner, there was a discussion about the petitioner having gone through a $300,000 bankruptcy (R. 121). A week after petitioner arrived, Bland went with petitioner to rent a house. The petitioner had a "roll of bills" that he had removed from his watch pocket, either fifties or hundred dollar bills (R. 97). In October, 1960, Bland discharged David Vanek for lying, Dean Vanek then quit his job (R. 110, 111). The Vanek brothers had discussed with Bland about going into business with the petitioner. The Vaneks were to borrow money to finance the business and petitioner was to contribute his ability (R. 112). Later, David Vanek showed Bland a check and currency and stated that he, his brother Dean and petitioner were going to open a used car business with the money (R. 113). Bland saw the books of the ABC Motors, the business

formed by the Vaneks and petitioner, and the books reflected that the Vaneks owned the business (R. 105), each contributing the same amount of money (R. 114). The first time Bland heard either of the Vaneks state that petitioner had invested money in the business was in the office of the U. S. Attorney on September 11, 1962 (R. 118) at which time the Vaneks also stated that petitioner had instructed them to tell no one he had money invested in the business (R. 119).

From the testimony of Dean L. Vanek. He went to work as a salesman for Valley Motor Company in May or June of 1960 and met the petitioner in the latter part of September of 1960 when petitioner went to work for the company. The petitioner asked Dean Vanek if he would like to go into the used car business. The petitioner stated that he had been successful in surplus sales and in the car sales but had gone through bankruptcy (R. 134). The petitioner indicated it would take about $10,000.00 to start the business and petitioner would match the funds put up by the Vanek brothers (R. 134, 135) and the profit would be split 1/3 to each. Joseph M. Vanek loaned his sons $5,000.00 for the business (R. 137). The petitioner and David Vanek went to Tacoma, Washington to pick up some office furniture. On the Monday following the trip, in the first or second week of October, the petitioner counted out $5,000.00, which was deposited with the Vanek money in a checking account (R. 138, 139). On this occasion the petitioner had more than $5,000.00, had a lot of hundred and fifty dollar bills (R. 139). The checking account was set up so that any two of the three, petitioner and the Vanek brothers, could sign the checks (R. 145).

The Vanek brothers did not have anything to do with setting up the books (R. 141). A week before Christmas, Priscilla Haugsness came down from Tacoma to set up the books and records (R. 140). The opening entry in the books reflected the Vanek brothers each having invested $5,022.50 (R. 142).

The Vanek brothers were shown as owners of the business because the petitioner wanted to be a silent partner due to his financial problems (R. 146). That because petitioner had been in bankruptcy, he wanted the Vaneks to say that petitioner had no money invested in the business (R. 148). The petitioner made draws from the business by checks issued to the Vaneks which they would cash and then turn the money over to the petitioner (R. 147). The Vaneks prepared all business forms, under the supervision of the petitioner, that the business was owned by David Vanek and Dean Vanek (R. 149). The bank account, lease and tax returns all stated the Vaneks were the owners of the business (R. 150).

On April, 1961, the Vaneks told petitioner they wanted him out of the business and the petitioner was to receive 50% of the business which was computed by petitioner to be approximately $12,000.00 (R. 151). The petitioner was paid between $8,000.00-$8,500.00 (R. 152), by 2 checks, a building and 5 or 6 automobiles (R. 153).

After petitioner left the business he threatened Dean Vanek with bodily harm if he told anyone that petitioner had invested money in the business (R. 155).

The profit which had initially been split 1/3 to each was changed to 50% to petitioner and 25% to each of the Vanek brothers (R. 164).

The Vanek brothers filed an assumed name certificate, Exhibit G, and an application for a business license, Exhibit H, as Dean Vanek and David Vanek d b a ABC Motors (R. 167, 168, 171). The certificate and application were signed under oath, before a notary public who happened to be their attorney (R. 171). The Vanek brothers filed a 1960 Oregon partnership return of income, Exhibit I, indicating they were the only owners of the business (R. 171). The Vanek brothers filed a 1961 Oregon partnership return of income and petitioner is not shown as a partner in the business (R. 173, 176). The insurance policies of ABC Motors indicate the Vanek brothers are the owners (R. 189). The Vanek brothers reported all income on their income tax returns (R. 202).

In April or May of 1961 the books and records were adjusted to show that petitioner had $5,000.00 invested in the business (R. 197). The partnership tax return was adjusted to show that petitioner received commissions of 1/3 of the profit (R. 198).

From the testimony of Joseph M. Vanek (the father of Dean Vanek and David Vanek). The petitioner offered his 2 sons the opportunity to go into the used car business. The petitioner stated that it would take $10,000.00 to start the business and that if the Vaneks could come up with $5,000.00 that petitioner would match this (R. 225, 226). Joseph Vanek loaned his sons $5,000.00, 1 check for $2,000.00 dated September 30, 1960, and 1 check for $3,000.00 dated October 11, 1960 (R. 231, 233). Whatever money was furnished by the petitioner was not to be shown, petitioner "coached" Vaneks that they were to tell that they put all the money in the business (R. 227)

After petitioner and Vaneks split up, petitioner asked Joseph Vanek that if he is ever called to testify, he should testify that petitioner had no money in the business (R. 235). Petitioner also asked him to convince his sons that they should testify that petitioner had no money invested in the business (R. 237).

In August of 1961 when petitioner demanded the remainder of his money, Joseph Vanek and Bland went to the F.B.I. "to get rid of him (petitioner)" (R. 238, 239). Since this time the petitioner has made no claims for money from the Vaneks (R. 245).

From the testimony of David J. Vanek. He met the petitioner while they were employed at Valley Motor Company in August, 1960. The petitioner proposed going into the used car business with the Vaneks to put up $5,000.00 and the petitioner to match it and profits to be split 3 ways (R. 250). On the first weekend in October, 1960, he went to Tacoma with petitioner to pick up office furniture (R. 252). Upon returning to Salem, Oregon, they stopped in Portland where petitioner went to the *Multnomah Hotel* and when he came out he had a "wad of money" which he said "he got it from a big time gambling friend" (R. 254). On the following day petitioner gave David Vanek $4,545.00 in cash with which a bank account was opened with $8,045.00 (R. 255). The remaining money came from the $3,000.00 check of Joseph Vanek and $500.00 of David Vanek's money, $400.00 was withdrawn from a savings account (R. 257, 258).

He had nothing to do with setting up the books (R. 260) nor did he maintain the books (R. 261). The bank account was set up with petitioner and Vanek brothers

(R. 261). The petitioner would make his withdrawals by checks to the Vanek brothers which would be cashed and the money paid to petitioner (R. 263). The business was set up in the Vaneks' name because petitioner said that if it was found out that he had money invested in the business, he would go to jail (R. 263). The petitioner stated that the records were not to show that petitioner had money in the business, that he was just the manager. The petitioner made all of the arrangements for setting up the records of the business (R. 264).

He was asked by others if petitioner had invested money in the business and he told the person making the inquiry no because the petitioner told him no one was to know that he had money invested in the business (R. 265).

The petitioner told David Vanek if he was ever contacted by anyone about the bankruptcy, he was to tell them that the Vaneks put up all of the capital, that he had the money in a safe deposit box (R. 269, 270).

The petitioner threatened David Vanek on 3 occasions (R. 271, 272).

He filled out bonds, certified by their attorney, that Vaneks owned the business (R. 274).

After his father went to the F.B.I., the petitioner made no further claims for money owing him (R. 278).

At the conclusion of the government's case, the petitioner moved to dismiss Count I of the information on the ground of insufficiency of the evidence (R. 292). The court denied the motion (R. 295). At the conclusion of all testimony, the petitioner renewed his motion to dis-

miss the information on the ground of insufficiency of the evidence (R. 608). The court denied the motion (R. 609).

REASONS FOR GRANTING THE WRIT

I. The Failure to Prove the Element of Materiality in the Crime of Perjury.

The Federal perjury statute provides that a person under oath who states or subscribes any "material matter" which he does not believe to be true commits the crime of perjury. Title 18 U.S.C., Section 1621 is set forth in Appendix-A, *infra*, p. App. 1.

This requirement of materiality is one of the essential elements of the crime of perjury. *U. S. v. Singleton*, 54 Fed. 488 (D.C., S.D. Ala. 1892); *U. S. v. Landsberg*, 23 Fed. 585 (C.C., S.D. N.Y. 1882). If the alleged false statement is not material, perjury is not committed since a defendant can be "convicted of crime only on proof of all elements of the crime charged against him." *Christoff v. U.S.*, 338 U. S. 84 (1949). Since 1927 the Federal courts have deemed the question of what is a "material matter" one of law for the court. *Carroll v. U. S.*, 16 F.(2d) 951 (C.A. 2nd 1927); *cert. denied*, 273 U. S. 763 (1927); *Sinclair v. U. S.* 279 U. S. 263 (1929); *U. S. v. Aly*, 246 F.(2d) 29 (C.A. 2nd 1957).

Perhaps a distinction should be employed in defining the phrase "material matter" when applied to open court as opposed to other forms of hearings where an oath is administered. In open court upon the trial of a law suit, the trial judge, by exercising his preliminary power of ruling on the materiality of evidence for admissibility pur-

poses, necessarily excludes much immaterial matter and directs the evidence toward matter which is generally material. Thus a witness at a trial can expect most of his testimony to be material in nature. Where the false testimony is not given at a trial, however, but before an administrative agency, a congressional committee, a grand jury, a referee in bankruptcy, all of which may stray far afield with no attempt to exclude irrelevant matter, a literal interpretation of "material" should be employed since a witness has little idea whether his testimony is material or not.

The respondent, during the trial, urged various tests to determine what is material under the perjury statute. Among these were: (1) That which is important and significant is material (R. 5, 6); (2) That a witness, the Referee in Bankruptcy, could testify as to materiality (R. 24, 25, 39); (3) That all testimony had at the hearing out of which the perjury arose, the testimony of the appellant as well as that of other witnesses, is material (R. 30, 31, 32).

Even the trial court demonstrated that it had difficulty with the element of materiality, that materiality was a jury question (R. 25) and that the defendant had withdrawn the question of materiality from the jury and had submitted the issue to the court (R. 42).

Carroll v. U. S., 16 F.(2d) 951 (C.A. 2nd, 1927), cert. denied 273 U.S. 763 (1927), and *U. S. v. Moran*, 194 F.(2d) 623 (C.A. 2nd 1952), cert. denied 343 U.S. 965 (1952), have clearly fixed that the test of materiality is *whether the testimony has a natural effect or tendency to influence, impede or dissuade the investigating body from pursuing its investigation.*

The perjury statute does not punish a falsehood which misleads no one, but only a falsehood which misleads the investigating body on a matter material to the investigation. Materiality to a proper subject in cases of perjury is the crux of punishable conduct under the statute. To make its questions material, the investigating body itself must be susceptible to influence on its valid subject by the testimony of a witness, and must not have closed its mind to the witness' testimony. Whether the investigating body has closed its mind to the witness' testimony would be determined by the general pattern of its members' conduct in and out of the hearing. *U. S. v. Icardi*, 140 F.Supp. 383 (D.D.C. 1956).

Whatever evidence the petitioner might give which would relate to the concealment of assets would have been no real consequence to the Referee's final determination, because they were not hearing his testimony with the intent to use it for that purpose. They intended only to punish him through the device of perjury for his part in the concealment of assets. To what extent that petitioner's testimony would influence the Referee on the subject of concealment of assets, the Referee already had the influence before petitioner testified, because acts of the attorney for the trustee showed that he unalterably resolved that the petitioner was guilty of concealing assets before the petitioner was summoned. Evidence of the ulterior purpose clearly appears in the suggestive commentary and statements of the attorney for the trustee and in the Referee's bold disregard for the ostensible valid nature of questions directed to the petitioner. The questions were immaterial because the Referee had no intention of making any proper use of petitioner's testimony

and could not be influenced by that testimony due to the premature judgment that petitioner concealed assets.

It is the contention of the petitioner that he did not commit perjury when he was examined on July 18, 1961, under §21a of the Bankruptcy Act. The petitioner contends that the questions propounded to him relating to whether he had made a capital investment of $5,000.00 in ABC Motors on or about October 11, 1960, were not material to any issue properly before the Referee in Bankruptcy for two reasons. First, even if the petitioner's answers on that occasion were capable of influencing the Referee in Bankruptcy, the Trustee in Bankruptcy and the attorney for the Trustee in Bankruptcy, as to whether or not petitioner invested capital in ABC Motors, a conclusion on this narrow subject would be immaterial to the purpose for which the examination was being held. Second, the Referee in Bankruptcy, the Trustee in Bankruptcy and the attorney for the Trustee in Bankruptcy already possessed sufficient information to make a complete determination regarding petitioner. The questions were immaterial because they could not influence the Referee, Trustee and the attorney for Trustee.

The examination of the petitioner on July 18, 1961, consisted of three statements that reflected the information that had been acquired prior to the date of the examination, they are as follows:

> "All right. Now, according to what you did turn in on the Portland sales between the time you opened up about March first or third and March the 15th, the sales that you turned in on the stubs showed $18,629.88, and during that same period you made deposits in Portland of $5,840.00, and you, accord-

ing to the records of the Portland Trust, you went into the Portland Trust and got $22,100.00 in $100.00 bills, the sum of $5,000.00 on the 15th of March, $10,000.00 on March 14th, and $7,100.00 on March 15th. This is a total of $22,100.00 in cash that you converted to $100.00 bills, and which was not reflected in any deposits, and in addition the $5,840.00. You reported $18,600.00 in sales on what you turned in to the Trustee of $28,000.00. Now where does this difference come in? (R. 65)

". . . the sales in Tacoma has also been checked against the deposits in Tacoma, and even giving them a full coverage of that period, it would still be a discrepancy in Tacoma of $6,000.00 also (R. 66).

"Well, now, as you recognize that $22,100.00 in a period of just two weeks, that didn't go into the bank, and going back to another feature here and taking the same disparity, we have gone through and taken all of your sales that you reported, which comes to a total of—these have been audited by the State Tax Commission, as well as checked by our own bookkeeper, but the total that you reported in sales amount to $7,520.00 in Portland and $48,767.50 in Tacoma. The total amount that you purchased, and for which you owed, according—still owe according to the bankruptcy schedules, is $258,446.00." (R. 66, 68)

The Referee in Bankruptcy possessed information prior to the examination of the petitioner that there were unaccounted funds of $9,340.00 ($27,940.00—$18,600.00) in the Portland sales and $6,000.00 in the Tacoma sales. These figures were substantiated by bank records, Portland Trust for the Portland sales, and by audit by the State Tax Commission and the Bankruptcy Court's own bookkeeper for the Tacoma sales. The figures were further substantiated in part by the books and records of the petitioner. The petitioner did not attempt to explain the discrepancies (R. 66, 67, 68) because he had no expla-

nation until he could review his books and records. From the recitation of the facts known to the Bankruptcy Court, it is apparent that the Court possessed sufficient information to make a complete determination, there was a discrepancy in sales of $15,340.00. No answer the petitioner could give to a question whether he had invested $5,000.00 in ABC Motors on October 11, 1960, could possibly influence the Court in making a determination that discrepancies in sales existed.

As stated in *Travis v. U.S.*, 123 F.(2d) 268 (C.A. 10th 1941), in order to support a charge of perjury based on testimony given in bankruptcy proceedings, the false testimony must have related to a material issue in the proceeding. When the Court of Appeals expanded the meaning of the word "material" to include the situation of this case then the word "material" was omitted from the statute.

It is submitted that this question is one of basic importance fully justifying the granting of certiorari. The Court of Appeals refused to answer this contention raised by the petitioner in his appeal from the United States District Court.

II. The Insufficiency of the Evidence to Prove the Crime of Perjury.

Perjury requires a higher measure of proof than any other crime known to the law, treason excepted. *People v. O'Donnell*, 132 Cal. App.(2d) 8 45, 283 P.(2d) 714 (1955); *State v. Wallis*, 50 Wn.(2d) 350, 311 P.(2d) 659 (1957). The following statements appear as to the quantum of proof required for a perjury conviction. In

Allen v. U.S., 194 Fed. 664 (C.A. 4th 1912), quoting from Greenleaf on Evidence, 30 Cyc. 1452, at page 668:

> "Positive and direct evidence is absolutely necessary in a perjury case. Circumstantial evidence standing alone is never sufficient."

See also *Clayton v. U.S.*, 234 Fed. 537 (C.A. 4th, 1922); *U.S. v. Otto*, 54 F.(2d) 277 (C.A. 2nd, 1931). In *Phair v. U.S.*, 60 F.(2d) 953 (C.A. 3rd, 1932), at page 954:

> "To convict a person of perjury, probable or credible evidence is not enough."

In *Smith v. U.S.*, 169 F.(2d) 118 (C.A. 8th, 1943), at page 121:

> ". . . to sustain a conviction, it must be shown by clear, convincing and direct evidence to a moral certainty and beyond a reasonable doubt that the defendant committed wilful and corrupt perjury."

The following cases sustain the contention: *Hart v. U.S.*, 131 F.(2d) 59 (C.A. 9th, 1942); *Fotie v. U.S.*, 137 F.(2d) 831 (C.A. 8th, 1943); *U.S. v. Slutzky*, 79 F.(2d) 504 (C.A. 3rd, 1935). In *Radomsky v. U.S.*, 180 F.(2d) 781 (C.A. 9th, 1950), at page 782:

> "In order to sustain a conviction for perjury there must be direct and positive evidence of the falsity of the statement under oath, and circumstantial evidence of such falsity, no matter how persuasive, is insufficient."

The Government's case rests entirely upon the testimony of a family unit, wherein two identical twins testified in corroboration of each other and their father in partial corroboration of them. The only independent Government witness, John Bland, who also had opportunity

to know whether the appellant had made a capital contribution to ABC Motors, could not corroborate the family's testimony and in fact, he stated that the first time he heard any of the Vaneks state that appellant had invested money in the business was in the office of the United States Attorney, September 11, 1962 (R. 118).

The documentary evidence indicates that the appellant did not invest $5,000 in the ABC Motors:

(1) Exhibit "B"—a contract to open a commercial checking account at the First National Bank of Oregon, Salem Branch, which reflects David J. Vanek, Dean L. Vanek and Joseph Vanek as owners of ABC Motors;

(2) Exhibit "C"—authorization for delivery of monthly statements of the ABC Motors account with the First National Bank of Oregon, Salem Branch, to David J. Vanek and Dean L. Vanek;

(3) Exhibit "G"—an Assumed Business Name Certificate which reflects David J. Vanek and Dean L. Vanek d b a ABC Motors, signed by Dean L. Vanek before a Notary Public;

(4) Exhibit "H"—an Application for a Business License which reflects David J. Vanek and Dean L. Vanek d b a ABC Motors, signed by David J. Vanek and Dean L. Vanek before a Notary Public;

(5) Exhibit "I"—1960 State of Oregon Partnership Return of Income which reflects David J. Vanek and Dean L. Vanek as partners in the ABC Motors; in addition, the 1961 State of Oregon Partnership Return of Income of the ABC Motors reflects David J. Vanek, Dean

L. Vanek and Joseph M. Vanek as the owners of ABC Motors (R. 173);

(6) Exhibit "K"—a Credit Application to the Statesmen's Journal Newspaper which reflects David J. Vanek and Dean L. Vanek as owners of ABC Motors;

(7) Exhibit "2-A"—the ABC Motors ledger sheet for the capital account reflects the capital contribution as being made by David J. Vanek and Dean L. Vanek.

The testimony of the disinterested witnesses indicates that the petitioner did not invest $5,000 in the ABC Motors:

(1) John M. Bland (R. 105, 113);
(2) J. G. Wiemals (R. 281);
(3) Richard H. Staggs (R. 290);
(4) Donald Ray Campbell (R. 331);
(5) Edward Donald Antrican (R. 398);
(6) Robert Earl Greeno (R. 535);
(7) William T. Pemberton (R. 549).

The testimony of the aforementioned witnesses with respect to the ownership of the ABC Motors appears by way of conversations had between the witness and either David J. Vanek or Dean L. Vanek during the time the petitioner was associated with the ABC Motors.

In its opinion the Court of Appeals dispenses with these contradictions as follows:

> "They (Vaneks) testified that they signed these papers and made these representations at Sigman's request."

Here the record does not fully support the Court's

statement. Neither of the Vaneks testified that they signed the 1960 and 1961 State of Oregon Partnership Return of Income, reflecting themselves as the sole owners of ABC Motors, at appellant's request. The 1960 return was prepared and filed subsequent to the appellant's departure from the business (R. 190) and the 1961 return was prepared and filed approximately one year after the appellant left the business (R. 174). It was after the appellant was indicted that the Vaneks filed amended returns to reflect the appellant as having contributed cash in the business (R. 198).

The plain fact of the matter is that the jury was requested to determine when Dean L. Vanek and David J. Vanek were committing perjury and when they were testifying truthfully. This does not constitute clear, convincing and direct evidence to a moral certainty and beyond a reasonable doubt that the appellant committed perjury. This opinion establishes a new quantum of proof in perjury cases and abandons the principle of law that perjury cases require a higher measure of proof than any other crime, treason excepted. The opinion is contrary to the *Allen v. U.S.*, 194 Fed. 664, 668 (C.A. 4th, 1912); *Clayton v. U.S.*, 234 Fed. 537 (C.A. 4th, 1922); *U.S. v. Otto*, 54 F.(2d) 277 (C.A. 2nd, 1931); *Phair v. U.S.*, 60 F.(2d) 953, 954 (C.A. 3rd, 1932); *U.S. v. Slutzky*, 79 F.(2d) 504 (C.A. 3rd, 1935); *Hart v. U.S.*, 131 F.(2d) 59 (C.A. 9th, 1942); *Fotie v. U.S.*, 137 F.(2d) 831 (C.A. 8th, 1943); *Smith v. U.S.*, 169 F.(2d) 118, 121 (C.A. 8th, 1943); *Radomsky v. U.S.*, 180 F.(2d) 781, 782 (C.A. 9th, 1950); *Umbriaco v. U.S.*, 258 F.(2d) 625 (C.A. 9th, 1958).

The appellant contends that the evidence presented in this case is not clear, convincing and direct evidence to a moral certainty and beyond a reasonable doubt that he committed perjury. As stated in *Brooks v. U.S.*, 240 F.(2d) 905 (C.A. 5th, 1957) at page 906:

> "Heinous as the crime of perjury is under our law, it is entitled to no relaxation of the constitutional guaranty of the citizens in order to punish it."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL M. STOCKER

ROBERT L. BUTLER

Counsel for Petitioner.

APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX A

Title 18, U.S.C., Section 1621:

"Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both."

Title 11, U.S.C., Section 44(a), (Bankruptcy Act § 21(a):

"The court may, upon application of any officer, bankrupt, or creditor, by order require any designated persons, including the bankrupt and his or her spouse, to appear before the court or before the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt: *Provided*, that the spouse may be examined only touching business transacted by such spouse or to which such spouse is a party and to determine the fact whether such spouse has transacted or been a party to any business of the bankrupt: *And provided further*, that the spouse may be so examined, any law of the United States or of any State to the contrary notwithstanding."

Title 11, U.S.C., Section 32(c) (1), (2), (4) and (7), (Bankruptcy Act § 14(c) (1), (2), (4) and (7):

"The court shall grant the discharge unless satisfied that the bankrupt has (1) committed an offense punishable by imprisonment as provided under Section 152 of Title 18; or (2) destroyed, mutilated, falsified, concealed, or failed to keep or preserve books of account or records, from which his financial condition and business transactions might be ascertained, unless the court deems such acts or failure to have been justified under all the circumstances of the case; or . . . ; or (4) at any time subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors; or . . . ; or (7) has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities: *Provided*, that if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this subdivision, would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt."

Title 11, U.S.C., Section 1(9), (Bankruptcy Act § 1(9):

"The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

* * *

"(9) 'Court' shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending."

Title 11, U.S.C., Section 66(2), (6) and (7), (Bankruptcy Act § 38(2), (6) and (7):

"Referees are hereby invested, subject always to a review by the judge, with jurisdiction to . . . ; (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; . . . (6) perform such of the duties as are by this title conferred on courts of bankruptcy, including those incidental to ancillary jurisdiction, and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and (7) during the examination of the bankrupt, or during other proceedings, authorize the employment of stenographers for reporting and transcribing proceedings at such reasonable expense to the estate as the court may fix."

Title 11, U.S.C., Section 69 a), (Bankruptcy Act § 41(a)):

"(a) A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpenaed, or, upon appearing, refuse to take the oath as a witness; or having taken the oath, refuse to be examined according to law: *Provided*, That a person other than a bankrupt or, where the bankrupt is a corporation, its officers, or the members of its board of directors or trustees or of other similar controlling bodies, shall not be required to attend as a witness before a referee at a place more than one hundred miles from such person's place of residence or unless his lawful mileage and fee for one day's attendance shall be first paid or tendered to him."

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRUCE M. SIGMAN, *Appellant*, v. UNITED STATES OF AMERICA, *Appellee*.		No. 18358 July 24, 1963

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

Before: BARNES, HAMLIN and DUNIWAY, Circuit Judges

DUNIWAY, Circuit Judge:

Sigman was convicted of perjury, (18 U.S.C. §1621) and he appeals. We conclude that the judgment must be affirmed. The pertinent portions of the statute are as follows:

> "Whoever, having taken an oath before a competent tribunal . . . in any case in which a law of the United States authorizes an oath to be administered, that he will testify, . . . truly, . . . willfully and contrary to such oath states . . . any material matter which he does not believe to be true, is guilty of perjury . . ."

Sigman was adjudicated an involuntary bankrupt in the District Court for the Western District of Washington, Southern Division, on May 26, 1960. Thereafter, pursuant to section 21, subdivision a, of the Bankruptcy Act (11 U.S.C. §44(a)), and at a time while the bankruptcy pro-

ceeding was still pending, he was ordered by the referee to appear before him on July 18, 1961. The pertinent portions of section 21a. are:

> "The court may . . . by order require . . . the bankrupt . . . to appear before the court . . . to be examined concerning the acts, conduct or property of a bankrupt . . . ."

He appeared at the hearing and was duly sworn, and questioned. He testified that in the latter part of 1960 he went into the automobile business in Salem, Oregon with twin brothers named Vanek, that the Vaneks owned the business, that he had his name on the business bank accounts only because the father of the Vaneks did not believe that they were old enough to sign checks individually, that his agreement with the Vaneks was that they were to pay him for teaching them the used car business and that they were to put up the money and he was to put up his ability and services, and that he put nothing else into the business. It was this testimony that was alleged to be perjurious.

At the trial on the perjury charge Sigman admitted the testimony and claimed that it was true. The government's principal witnesses were the two Vanek twins and their father. Each of them testified, in substance, that the Vaneks put into the business $5,000 that they borrowed from their father, that Sigman put $5,000 in the business in cash, in large bills, that when the business relationship was terminated six months later he was to receive his investment plus a share of the profits, a total of about $12,000. Sigman testified at the bankruptcy hearing that the Vaneks still owed him about $3,400. It also

appeared both at the bankruptcy hearing and at the trial on the charge of perjury that Sigman had received from his business operations, prior to the bankruptcy, substantial sums which he converted into $100 bills and for which he was unable to account. The testimony indicates that the money that he put into the business venture with the Vaneks may have been part of this cash which he did not turn over to the trustee in bankruptcy.

Sigman's principal contention is that there was a failure to prove that the false testimony that he gave at the bankruptcy hearing was "material" within the meaning of 18 U.S.C. §1621. The parties are agreed that, although the question of what testimony Sigman gave at the bankruptcy hearing is one of fact, the materiality of that testimony is a question of law for the court. (See *Sinclair v. United States*, 1929, 279 U.S. 263, 298; *Carroll v. United States*, 2 Cir., 1927, 16 F.2d 951, 954; *Luse v. United States*, 9 Cir., 1931, 49 F.2d 241, 245; *Travis v. United States*, 10 Cir., 1941, 123 F.2d 268, 270; *United States v. Alu*, 2 Cir., 1957, 246 F.2d 29, at 32.)

The trial court correctly held that the testimony was material within the meaning of the perjury statute. As the Supreme Court said in *Cameron v. United States*, 1914, 231 U.S. 710, referring to §21a. of the Bankruptcy Act:

> "The object of the examination of the bankrupt and other witnesses to show the condition of the estate is to enable the court to discover its extent and whereabouts, and to come into possession of it, that the rights of creditors may be preserved." (p. 717)

Another purpose is to develop facts and circumstances

which bear upon the question of discharge. (*Travis v. United States, supra*, at p. 271) The matters that were inquired into before the referee related directly to both of these purposes. They involved the possible concealment of property, to wit, cash, and its investment in the business venture with the Vaneks. They also related to the possibility of denying a discharge. See section 14, subdivision c of the Bankruptcy Act, and particularly subclauses (1), (2), (4) and (7), (11 U.S.C. §32(c)).

Sigman suggests that a narrower test of materiality should be applied to testimony before a referee in bankruptcy than would be applied where the testimony is given before a court. However, for the purpose of conducting the section 21a hearing, the referee was acting as an arm of the court (Bankruptcy Act, §§1(9), 38(2), (6), (7), 41a; 11 U.S.C. §§1(9), 66(2), (6), (7), (69a)). The same rules of evidence apply as to a hearing before a judge (see *Langham, Langstrom & Burnett v. Blanchard*, 5 Cir., 1957, 246 F.2d 529, 534). We find no merit in the point.

Sigman also urges that the prosecution did not meet the rigid standards of proof that apply in perjury cases, citing among others, our decisions in *Hart v. United States*, 9 Cir., 1942, 131 F.2d 59, 61, and *Radomsky v. United States*, 9 Cir., 1950, 180 F.2d 781. In the latter case we said that "there must be direct and positive evidence of the falsity of the statement under oath, and that circumstantial evidence of such falsity, no matter how persuasive, was insufficient" (pp. 782-783). (See, also, *Umbriaco v. United States*, 9 Cir., 1958, 258 F.2d 625, 626, 628.) It is also the rule that "the uncorroborated oath of

one witness is not enough to establish the falsity of the testimony of the accused (*Weiler v. United States*, 1944, 323 U.S. 606) We think that the proof in this case clearly meets the applicable standards. All three of the Vaneks testified, and each of them testified that Sigman did put $5,000, in cash, in the form of large bills, in the business and had one-half interest in it. This testimony, if believed, was sufficient. There was also partial corroboration, as to Sigman's possession of cash, by another witness, one Bland. It is claimed that the Vaneks were impeached by various documents that they signed, such as signature cards at banks, a certificate of doing business under a fictitious name, and income tax returns in which they represented that they were the sole owners of the business, and that they had a motive to testify falsely because Sigman claimed that they owed him money. They testified that they signed these papers and made these representations at Sigman's request, and that he told them that his name could not appear anywhere as a co-owner of the business by reason of his bankruptcy. This evidence presented a question of credibility, and the jury resolved it in favor of the government. Once the required quantum of proof is met, the jury is as much the trier of fact in a perjury case as in any other case, and its decision on questions of credibility is final. (*Weiler v. United States*, *supra*; *Adams v. United States*, 9 Cir., 1951, 191 F.2d 206; *Miranda v. United States*, 9 Cir., 1952, 196 F.2d 408, 411)

Affirmed.

(Endorsed) Opinion Filed July 24, 1963.

FRANK H. SCHMID, *Clerk*

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRUCE M. SIGMAN, *Appellant*, v. UNITED STATES OF AMERICA, *Appellee*.	No. 18358 Filed Sept. 11, 1963 FRANK H. SCHMID, *Clerk*

Before: BARNES, HAMLIN and DUNIWAY, Circuit Judges

ORDER ON PETITION FOR REHEARING

IT IS ORDERED that the opinion filed herein on July 24, 1963, be and the same is hereby modified in the following respects:

1. The sentence beginning at line 17 on page 2 of the printed slip opinion with the words "each of" and ending at line 23 on page 2 with the words "about $12,000" is hereby modified to read as follows:

> "Each of them testified, in substance, that the Vaneks put into the business $5,000 that they borrowed from their father, that Sigman put $5,000 in the business (the two sons said that this was in cash in large bills), that when the business relationship was terminated six months later he was to receive his investment plus a share of the profits, a total of about $12,000."

2. The sentence beginning at line 7 on page 4 of the printed slip opinion with the words "all three" and ending at line 9 on page 4 with the words "in it" is modified to read as follows:

> "All three of the Vaneks testified, and each of them testified that Sigman did put $5,000 in the business

and had a one-half interest in it. The two sons testified that the $5,000 was in cash in the form of large bills.".

The petition for rehearing is denied.

STANLEY N. BARNES
OLIVER D. HAMLIN, JR.
BEN C. DUNIWAY
United States Circuit Judges

Dated: September 11, 1963.

APPENDIX C

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

In the Matter of BRUCE M. SIGMAN, d/b/a SEATTLE-TACOMA AUTO EXCHANGE, AMERICAN BUYERS' SERVICE, CENTRAL SURPLUS, *and* POLKA DOT SALES, *Bankrupt.*	No. 19478 In Bankruptcy

PARTIAL TRANSCRIPT OF PROCEEDINGS

July 18, 1961.

"A. No, I mean just stayed a couple of places, relatives.

"Q. What are the names of the relatives?

"A. I am not sure whether I did or not. I don't remember. It seems quite a while ago. I think those were the two residences that I stayed at.

"Q. You said relatives.

"A. I mean just a matter of a day or two.

"Q. What are the names of the relatives?

"A. That would be Nyberg. It is Beverly's brother. I can't think of his first name right now.

"Q. What relation?

"A. It is Beverly Nyberg's brother.

"Q. Well, that is not a relative of yours?

"A. No, not a relative.

"Q. Is there anybody else that you stayed with?

"A. Not that I can think of. I think it was either—we stayed there or we stayed with her folks, I am not sure which one it was.

"Q. What are the names of her folks?

"A. Tony Larson.

"Q. And where do they live?

"A. On Dallas Road. I don't know the address.

"Q. Now, what business have you been in since you have—since you have been down there almost a year, what business have you been in?

"A. I have worked for Skyline Ford, and I went in the automobile business with the Vanek twins. They owned it, but I was operating with them, I was getting fifty per cent of their business.

"Q. What are their names?

"A. Dean Vanek and Dave Vanek.

"Q. Where did they live?

"A. They live in Salem, Oregon.

"Q. Do you have any authority on any bank accounts of the firm?

"A. When I went in with them, their father didn't feel they were old enough to sign checks individually, so they put the checks where I would sign it if I wanted to sign, I would sign with one of those, but I didn't have any individual authority on that.

"Q. In other words, no check could be honored unless it bore your signature together with one of theirs, is that right?

"A. No, that is not correct.

"Q. What is the situation?

"A. The situation is it would take either of their signatures or one of their signatures and my signature.

"Q. Now, are there any other authorized signators on that account?

"A. I think now their father's authorized signature is on that account.

"Q. What is his name?

"A. Joseph Vanek.

"Q. How long have you known the Vaneks?

"A. Approximately a year.

"Q. In other words, you practically immediately went to work with them?

"A. I met the Vaneks out at the Valley Ford, and we went—we worked together for a while, and I think they were impressed by my ability or my conversation, whichever it may be, and I talked—told them about the automobile business and how much better it was than selling for somebody else, and convinced them to go into the automobile business.

"Q. Now, about what day did you go into this business with them?

"A. I would say it was probably about December. I am not sure of the exact date.

"Q. Before Christmas?

"A. It was December or January or November. I am not quite sure. I can't remember.

"Q. Well, it was close to Thanksgiving?

"A. As close as I can tell you, it is probably November or December.

"Q. All right. Now, in what banks have you had bank accounts on which you were authorized signator during this period?

"A. Well, since then—

"Q. No, I mean starting right back then, what is the name of the bank?

"A. I want to go a little bit further, if you don't mind. I want you to get all the facts and not just part of them. I had an authorized signature in that bank with them.

"Q. What bank is that?

"A. That is the First National Bank of Salem, I think that is the name of it. I am sure they have the records and the checks there. I am sure it would be easy to verify.

"Q. Is there any other bank account you were authorized signator on?

"A. Yes, I do have a couple of bank accounts that I have signatures of my own. After being in business with them for a short time, and their agreement with me was to give me a larger share of the business, because I was the one who had the ability and was going to teach them the business, and et cetera, they decided to get me out of the business. They felt I was getting too much of it, and they then just previous to that time—we were going to start another car lot in Corvallis, Oregon. So in the settlement they gave me the Corvallis car lot, and I opened a bank account there, and I showed it under their name because of the fact that they had the license, and I then had the only authorized signature in that bank. It was set up, and they would have an authorized signature in case something had happened to me, or necessary, and we never got around to it because the lot only stayed open a short time, and then across the street from that is the Corvallis Bank, I think that was called the Corvallis Citizens Bank. There was another bank, and I think it is a U. S. National. We started a small account there, and I had my authorized signature, and then I had a couple of fellows who went to work for me, and I authorized—took two signatures of theirs to sign the thing, and they had authorized signatures on the account.

"Q. What were their names?

"A. Paul Peters, who was killed in an automobile accident approximately a month ago, and Cal Stavenau.

"Q. They were both residents of Corvallis?

"A. No.

"Q. Where did they reside?

"A. They resided in Salem.

"Q. And during what period was this Corvallis operation open?

"A. I would have to look at the records. I don't know exactly.

"Q. Approximately.

"A. I don't even have an approximate figure. I would have to look at the records. I am kind of—I think I closed that about five weeks ago.

"Q. And you said it opened for about a month?

"A. A month or maybe a month and a half. I am not sure of the exact time, a month to a month and a half, maybe two months. I am not sure of the exact time.

"Q. Well, are those two bank accounts still open?

"A. No, they are not.

"Q. Are you an authorized signator on any bank account at the present time?

"A. No, I have none, unless they left my signature on their A.B.C. Motors, and I don't know whether they have or not. I rather doubt it.

"Q. And what are you doing at the present time?

"A. At the present time?

"Q. Yes, sir.

"A. I am trying to put a deal together to get back into the car business again.

"Q. Now, when you settled up with them, did they give you any money?

"A. Yes, they did.

"Q. How much money did they give you?

"A. I can give you approximate figures. I think I got approximately $4,200 in cash, approximately $1,700 in cars, and we had a building that they bought that was worth $1,300, which was the office building over at Corvallis, and I got that.

"Q. What was that for?

"A. This was in our settlement—our original agreement, they were supposed to pay me for teaching and

training them in the business, and if they separated it within two years—let me guess—and our original agreement, I was supposed to retain for teaching and training them. We talked quite a bit, and I told them, I said, 'Well, I don't want to go ahead and do all this work and then, after you guys got the money, then I will be out.'

I says, 'If I should leave here, I want to retain 25 per cent interest at all times, and I will get 25 per cent,' and at that time, of course, they were ready to go on a deal, and they were pretty hot, and they were ready and said yes.

Then, when they bought me out, they wanted to buy me out completely, so they paid me out for this phase of the business, plus the business had some money, and they had spent money for improvement on the property, and there was such things as they had put up lights and heaters, and it was quite involved, and then there was an accounts receivable, and I got half of the accounts receivable, which was considered—there was approximately ten or eleven thousand dollars worth of receivables there which was paper profit, where you sell a car and maybe you got $400 in the automobile, and you sell it, say, for $700 and there is $300 you get. You get $400 out and get $300 worth of paper profit, and I got half of that, and they were paying me off on that at the rate of approximately $500 a month.

"Q. Now, is that in addition to the cash you mentioned?

"A. That is in addition to the cash, that is right.

"THE REFEREE: How much was that?

"THE WITNESS: Approximately $5,000 for that.

"Q. (By Mr. Eddleman) Your share, in other words, eleven thousand was the total and five thousand is that what you got?

"A. I would think it was more than that. They were real anxious to get me out of the business. I don't

know why, but they were very anxious to get me out of the business.

"Q. Five thousand is what you accepted?

"A. Yes. I accepted the—the total thing was, I think approximately $12,000, or something like that, and—

"Q. And how much of that do they still owe you?

"A. Well, we had a kind of—there is kind of—it was kind of up in the air because there is actually—the accounts receivable, some of them turned bad, and they aren't any good. So they actually owe me about $3,400, but I have to make an adjustment with them, and I suppose it will probably be I will wind up out of that $3,400, probably a couple thousand dollars out of it.

"Q. Well, at the present time, though, it is $3,400?

"A. At the present time it isn't $3,400 because we agreed that we had to make adjustments, so there isn't any definite figure.

"Q. All right. Now, was any part of any of these agreements in writing?

"A. Actually, no.

"Q. You had no agreements in writing?

"A. All of our agreements were orally with their father and with them, that is right.

"Q. Now, aside from your services, did you put anything into this business?

"A. No, sir.

"Q. During the period between January 29, 1960, when you opened the Central Surplus, and May 5, 1960, when you made the assignment, you didn't deposit any cash in that period in the Central Bank, did you?

"A. Well, to the best of my knowledge, I don't remember, but I think that I did. I thought that I did. Certainly the deposit receipts should be able to show whether I did or didn't.

"Q. Well, assume for the sake of this question that the deposit receipts reflect that you did not put any cash in. It reflected that during this period, when you had Central Surplus open here, you didn't put any cash in, and that you solely put in checks that you received over there at Central Surplus. The checks received were included on the deposit slips, but no cash.

Now, will you tell me where you kept the cash?

"A. I kept the cash on me, my person, and when I was in Portland, I told you I had a couple of safety deposit boxes in the hotel, and I kept them there.

"Q. Yes, sir, but when you were in Portland and the funds were collected up here, we have had some testimony from other witnesses who indicate they did not keep the funds but the cash was separated and turned over, and my question to you is where was it kept here?

"A. Where was it kept here?

"Q. Yes, sir.

"A. Well, I came up and picked it up and I took it back to Portland with me.

"Q. Each day?

"A. Well, not each day. I would say every two or three days. It was usually put in an envelope and sealed and handed to my wife, Marguerite, and when I come up, she would give it to me, and that is it.

"Q. Did you keep these envelopes?

"A. No, sir, I didn't.

"Q. You destroyed them?

"A. I am sure that I did. I didn't destroy them. I just threw them away in the wastebasket.

"Q. So that any cash that came out of the Surplus here was either turned over to you or to your wife, is that correct?

"A. It was all ultimately turned over to me.

"Q. But if you weren't here, it was turned over to your wife, is that correct? That has been the testimony of the other witnesses. Is that true or untrue?

"A. Just a second. I would say primarily so. I mean there might have been some times when somebody else may have held it.

"Q. Who, for example? Do you know of any instance where that occurred?

"Q. I think it was left in the store sometimes under the—they hid it under some bags or something. I am not quite sure.

"Q. Didn't you have a safe down there in the store?

"A. No, we didn't have a safe down in the store.

"Q. All right. Now, you didn't deposit any cash in the—either of the banks you did business with in Portland, did you?

"A. I don't know whether I did or not. I may have deposited some cash.

"Q. Well, assume for the record that the records reflect that you deposited no cash. What was the procedure followed with respect to the cash derived from sales?

"A. Well, it was used to cash checks.

"Q. Yes, sir, but what was left after the checks were cashed? What procedure was followed?

"A. It was used. I carried a great share of the cash, and I kept it in the safety deposit boxes, and I used it to pay bills.

"Q. What safety deposit boxes?

"A. In the hotel.

"Q. More than one?

"A. There was two safety deposit boxes there at the Heathman Hotel.

"Q. Did you have both of them reserved for your use?

"A. Yes, I did.

"Q. During the entire period? In other words, the only place where you kept cash after it came out of either Central Surplus or the Polka Dot Sales, whether it was held by your wife, and then turned over to you, and when it was given to you, the only place you kept it was in the Heathman Hotel in the safety deposit boxes there, is that true?

"A. To the best of my knowledge it was either put in the hotel safety deposit boxes or carried on my person or kept in my room.

"Q. And your room, you are talking about, was in the Heathman?

"A. Yes.

"Q. The New Heathman or the Heathman?

"A. The New Heathman Hotel.

"Q. That is the only places that you kept any cash during this period from January 29, 1960, when you opened the Central Surplus, to the date of May 5, when you made the assignment to the Tacoma Association?

"A. Well, with the exception I think I left money in the bag in Tacoma a couple of times when I did something. I left it in the house and in the bags or in the envelope, and how the hell did I leave it. I left it at home, and that was all. I left some money at home. If I would go on a trip or something, I would leave it at home.

"Q. Now, you opened the Polka Dot Sales in Portland on about the third day of March, 1960, didn't you?

"A. I am not sure of that date, sir. I thought it was before that, but I am not sure. I would have to check it.

"Q. And your practice in reporting sales was—how did you report sales?

"A. What do you mean, how did I report sales?

"Q. Just how did they get into your books and records

to reflect the total amount of sales that you reported in this bankruptcy?

"A. Well, we made little slips of paper up and wrote them on an envelope, or made up slips of paper, and I made up some envelopes, and I gathered all these slips of paper showing the amounts of money that were taken in. I did it to the best of my ability. We were in the process of trying to get some books set up when things started to go bad for us.

"Q. So the only records of sales that you turned over to the court and to the trustee is what was written on the outside of these envelopes, is that correct?

"A. That is correct.

"Q. You destroyed the slips or tapes that came out of the National cash registers that you had down there, didn't you?

"A. They were pretty well destroyed every night when they were taken out. I mean they were taken out because the cash registers weren't accurate at that time.

"Q. These were brand new cash registers, weren't they?

"A. Mr. Eddleman, they were not brand new cash registers. They were broken down several times. We had them over there to get them to operate.

"Q. But they did operate very effectively part of the time, didn't they? At least according to the other witnesses they have.

"A. We were new in this business, and we didn't know how to really operate these things properly. I had never operated a cash register before like these, and it was pretty hit and miss.

"Q. Some of your employees were quite acquainted in knowing how to operate those down in Portland?

"A. We tried to impress them. We thought we knew how, so we thought.

"Q. I mean some of the employees would have had experience with them, you knew that, and were quite well acquainted with National cash registers and how to operate them?

"A. I wasn't aware that anyone had experience.

"Q. Well, as a matter of fact, weren't the tapes by some of these employees turned over to you, Mr. Sigman, and then you used them, however you cared to, at the end of the day's business?

"A. I am sure that I must have eventually got them some time or another. I feel that I might have. . .

"Q. And did you ever take the trouble to check the amount of the cash registers against what you reported as sales?

"A. I am sure that I tried to several times.

"Q. Well, was it very hard to do?

"A. Well, let me say this to you, it was confusing.

"Q. Well, when you take the total off of one of the cash registers and took the total off of the other cash registers, and—

"A. We had two cash registers there, sir, and they were really confusing the way the money got all mixed up, and so forth, and they were rather confusing.

"Q. But after you had the tapes, a matter of checking whether the total coincided with what you reported for sales was not too complicated, was it? Do you understand how to do that, take the total of the tapes at the end of the night? Did you ever do that?

"A. Yeah, I tried to do this, but, of course, you see, I don't know whether we operated like anybody else, but we usually took and rung up all the change. We put that in there, too, in the first part of the day. That is why you couldn't use that tape as reflecting sales.

"Q. You can't keep track of the amount of change you put in in the first part of the day?

"A. I did.

"Q. Why couldn't you take it off at the end of the day?

"A. I did, but I mean I didn't use that tape because that would show that I had that much more in sales.

"Q. Yes, but then after you took the cash that you put in at the beginning of the day off, you could still check it against your slips that you turned in to the court and to the trustee. Now, did you do so or not?

"A. Did I do what?

"Q. Did you ever take the trouble to check the amount that came off of the slips in the cash register, the tape totals with the adjustments that may have been necessary for what you had done about cash? Did you ever take the trouble to check these against what you turned in as being sales?

"A. As I remember, I tried to do this, and I remember that we were quite a ways off many times.

"Q. What way were you off?

"A. Well, usually there were shortages.

"Q. Shortages in what you were turning in?

"A. I only turned in what there was, sir. I couldn't turn in something that there wasn't.

"Q. All right. Now, according to what you did turn in on the Portland sales between the time you opened up about March first or third and March the fifteenth, the sales that you turned in on the stubs showed $18,629.88, and during that same period you made deposits in Portland of $5,840, and you, according to the records of the Portland Trust, you went into the Portland Trust and got $22,100 in $100 bills, the sum of $5,000 on the 15th of March, $10,000 on March 14th, and $7,100 on March 15th. This is a total of $22,100 in cash that you converted to $100 bills, and which was not reflected in any deposits, and in addition the

$5,840. You reported $18,600 in sales on what you turned in to the trustee of $28,000. Now, where does this difference come in?

"A. I am sure I would have to check it to find out. I mean this is over a year ago.

"Q. How would you check it?

"A. I don't know at this time. I would have to sit down and look at the books and maybe I could figure out what you are talking about. You are far over my head at this time.

"Q. Well, I have right here the report from the bank, Mr. Sigman, which shows you came in and shows the days on which you came in, and the $100 bills they gave you. There is $22,100. We have got the slips right here that you made up on sales.

"A. I don't—you don't suppose that some of that money was brought from Tacoma up there, and that I cashed that money into $100 bills down there? Do you suppose that could have happened?

"Q. That would be a fair possibility if it were not for the fact that the sales in Tacoma have also been checked against the deposits in Tacoma and, even giving them a full coverage of that period, it would still be a discrepancy in Tacoma of $6,000 also.

"A. Well, this I don't know. The only thing I can say is this, you remember that I don't know where it comes from, I would have to sit down and check it out, and I can't figure these things out unless I see what you are talking about.

"Q. You just opened the place of business in Portland?

"A. Right.

"Q. And the first fifteen days down there—

"A. We took money from Tacoma down there, too.

"Q. Yes, sir, and in the first fifteen days you went in, and you wouldn't need with respect of that money to go in and get it changed to $100 bills, would you?

"A. I took that money and put it in $100 bills because it was easier to carry and easier to count and easier to put away.

"Q. Well now, as you recognize that $22,100 in a period of just two weeks, that didn't go into the bank, and going back to another feature here and taking the same disparity, we have gone through and taken all of your sales that you reported, which comes to a total of—these have been audited by the State Tax Commission, as well as checked by our own bookkeeper, but the total that you reported in sales amounted to $7,520 in Portland and $48,767.50 in Tacoma. The total amount that you purchased, and for which you owed, according—still owe according to the bankruptcy schedules, is $258,446.

"A. Is it all right if I write it down? . . ."